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ABSTRACT

Local boards of education in New Jersey are authorized by law to withhold increments of staff members in certain circumstances. The purpose of this publication is to provide an analysis and summary of decisions involving a board's exercise of this authority, and it is intended to serve as a guide and a reference tool to be used in determining when and how increments can be withheld. The first two sections construe the statutory language that gives boards this authority and establishes the nonnegotiability of increment withholding decisions by local boards. The next section discusses appeals for review of increment withholdings by the commissioner of education. Decisions are discussed that (1) clarify the standard of review, (2) uphold actions by local boards, and (3) restore employees' increments. The third section reviews decisions interpreting the procedural requirements at the administrative and board levels that must be met in withholding increments. A final section discusses the four options available to local boards in determining the exact increment amount to be withheld and the time period for withholding it: (1) employment increment only, for one school year; (2) employment increment only, but on a permanent basis; (3) entire increment for one year; and (4) permanent denial of entire increment. (TE)

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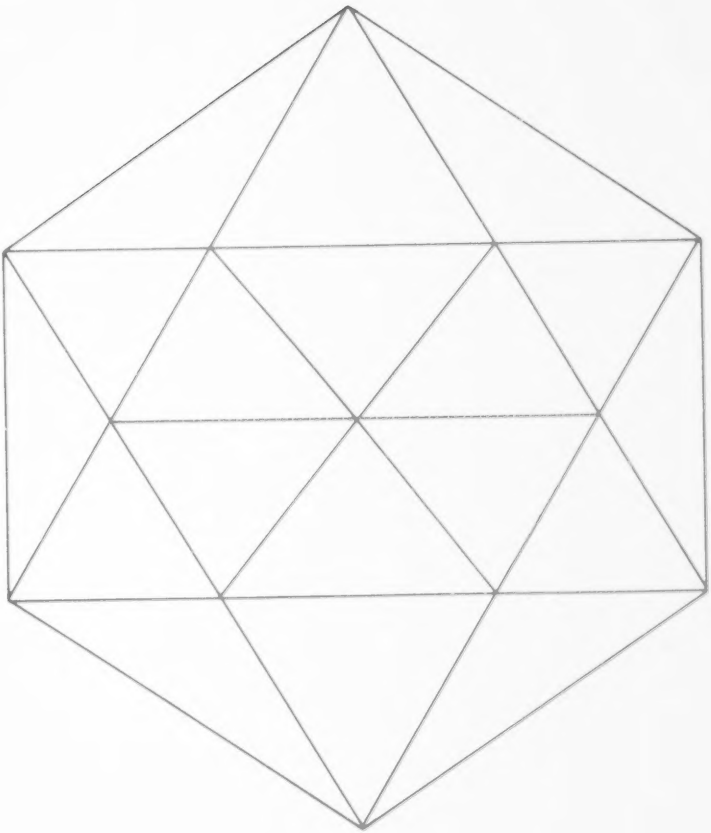

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FOCUS ON: **WITHHOLDING INCREMENTS**

WITHHOLDING INCREMENTS

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INTRODUCTION

N.J.S.A. 18A:29-14 authorizes local boards of education to withhold the increments of staff members in certain circumstances. The purpose of this publication is to provide an analysis and summary of decisions involving a board's exercise of this authority, and it is intended to serve as a guide and a reference tool to be used in determining when and how increments can be withheld.

Although increments can be withheld from both tenured and non-tenured teaching staff, the procedure is most commonly used with respect to tenured teaching staff. As for non-tenured teaching staff members whose performance is deficient, the board can simply refuse to renew the teacher's contract for the coming year. With respect to a tenured staff member whose performance is deficient, however, increment withholding is an attractive alternative to the cumbersome process of certifying tenure charges.

The withholding of a salary increment has several advantages over the bringing of tenure charges. The first advantage is a savings in time and money. A salary increment can be withheld unilaterally by the board. The Commissioner becomes involved only in those cases where the teacher appeals. In contrast, tenure charges, in order to be sustained, are nearly always litigated in full before the Commissioner. Moreover, in a substantial percentage of those tenure cases in which the Commissioner ultimately has upheld charges against the teacher, the penalty imposed is not termination of employment but simply a temporary reduction in salary! The net result is that the board has gone through what is often a very costly and lengthy procedure and has achieved the same results available through the relatively simple procedure of withholding an increment.

For 1976-80, it took an average of 21 months for a contested tenure case to be decided by the Commissioner. Because the board must pay full salary during this period after the first 120 days, and because the average teacher's salary in 1980 was approximately $17,159, it could cost the board $30,000 just to bring tenure charges regardless of their ultimate success. With the advent of the Office of Administrative Law in 1979, the time necessary to obtain a decision in tenure cases has been reduced somewhat. However, the costs of bringing tenure charges can still be substantial, particularly if attorney fees and the time and cost of case preparation by administrators are figured in.

The point to be made here is not that tenure charges should never be brought. Where the charges are serious and well documented, the board has an obligation to bring tenure charges and seek the teacher's dismissal for the good of the school system. But where the charges are such that the likely penalty to be imposed by the Commissioner is merely the withholding of the teacher's increment or some comparable financial penalty, it is not advisable to bring tenure charges under the present system.

Thus, for performance deficiencies which would not justify the outright dismissal of a tenured teacher, the board can simply withhold an increment on its own in the first instance. The teacher of course has a right to challenge this, but the board will not be in the position of paying out salary for time not worked. Further, litigation costs will be incurred only if the teacher appeals the case.

Another crucial difference between bringing tenure charges and withholding an increment is the burden of proof. In a tenure case, the teacher is presumed fit to continue teaching and it is up to the board to prove that the charges are true and that some penalty is justified. In an appeal to the Commissioner from the

withholding of an increment, the board's action is presumed valid and it is up to the teacher to prove that a basis exists for overturning the board's decision. This is a very important distinction. See the discussion below on "Standard of Review."

STATUTORY AUTHORITY

Local boards of education are permitted to adopt salary schedules for all full time teaching staff members pursuant to *N.J.S.A.* 18A:29-4.1. Such salary schedules must meet the minimum amounts set out in *N.J.S.A.* 18A:29-7.

The authority of a board of education to withhold increments is also set out by statute:

> *Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment. [N.J.S.A. 18A:29-14]*

Early rulings of the Commissioner of Education required boards to have a specific provision in their salary policies pertaining to the withholding of increments. Absent such a provision, the Commissioner held that a board could not withhold the increment of a teaching staff member where the salary schedule was in excess of the statutory minima.

This longstanding rule was overturned in 1974 by the Appellate Division in *Westwood Ed. Assn. v. Westwood Bd. of Ed.* (unreported decision, No. A-261-73, June 21, 1974) 1974 *S.L.R.* 1436, certif. den. 66 *N.J.* 313 (1974). In that case, the union had relied upon the prior decisions of the Commissioner and had argued that the statute authorizing the withholding of increments applied only to salary schedules set at the minimum amount permitted under *N.J.S.A.* 18A:29-7.

The court in *Westwood* clearly rejected these prior decisions so that, today, it is clear that 18A:29-14 itself authorizes boards to withhold increments and that the negotiated agreement need not contain a clause stating that increments may be withheld.

NON-NEGOTIABILITY

In *Bernards Township Bd. of Ed. v. Bernards Township Ed. Assn.*, 79 *N.J.* 311 (1979), the New Jersey Supreme Court resolved some basic questions concerning collective negotiations and increment withholding decisions of local boards. The Court ruled that parties to a collective agreement may not validly contract to submit disputes concerning the withholding of increments for inefficiency or other good cause to final and binding arbitration.

Although the Court recognized that the withholding of an increment directly affects the work and welfare of teaching staff, it noted that the withholding decision must be based on "inefficiency or other good cause" under the statute and that the decision is thus dependent upon the evaluation of the quality of the services which the teacher has rendered. Because the local board is therefore making a judgment concerning the quality of the educational system, the Court concluded that a board's decision to withhold an increment is a matter of essential managerial prerogative pertaining to governmental policy, is therefore not a term and condition of employment and thus cannot be submitted to binding arbitration.

The Court also stated that the parties could not have agreed to alter the "inefficiency or other good cause" standard for withholding increments because such an agreement would not only impermissibly intrude upon matters of managerial prerogative but would also contravene the specific statutory standard of *N.J.S.A.* 18A:29-14.

However, in an interesting and unexpected turn of events, the Court in *Bernards* also ruled that an agreement to submit increment withholding disputes to advisory arbitration is permissible. Advisory arbitration of such disputes would serve only as an intermediate procedural step that would not impinge upon the review power of the Commissioner of Education; the Commissioner would not be required to accept any of the arbitrator's findings or conclusions but would simply have the benefit thereof as one independent source of information to assist in his determination.

The Commissioner of Education has subsequently held that a contract cannot specify criteria to be applied by a board when withholding increments, stating that such provisions would represent an impermissible elaboration on the statutory standard of good cause. *Gollub v. Englewood Bd. of Ed.*, 1980 *S.L.D.* (December 4). In the same vein, *Gollub* also held that if, as a teacher had argued, a local board had agreed to grant automatic increases to teachers once they had reached their maximum step, the agreement would have been void as a surrender of the board's statutory right to make judgments about a teacher's worthiness to receive increments. *See also, Bailey v. North Brunswick Township Bd. of Ed.*, 1980 *S.L.D.* (December 15).

COMMISSIONER REVIEW OF INCREMENT WITHHOLDINGS

1. Standard of Review

N.J.S.A. 18A:29-14 specifically provides that a local board may withhold an increment for "inefficiency or other just cause" and that any teaching staff member whose increment is withheld by a local board of education is entitled to appeal the board's decision to the Commissioner of Education. In only a very small percentage of all such appeals to the Commissioner has the action of the local board been reversed on the merits. This is due in large part to the standard of review applied by the Commissioner in these cases.

The leading case in this area established that the decision of a local board of education to withhold an increment of a teaching staff member is a "discretionary" action which may not be upset unless found to be arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Bd. of Ed., 60 N.J. Super.* 288 (App. Div. 1960).

Elaborating further on this standard, the court quoted the following language with approval:

> . . *the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion. Id. at 295.*

The court stated further:

> *we think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant. Id. at 296-97.*

Thus under the first part of this standard, if, for example, a teacher's increment was withheld on the basis of repeated failure to maintain order in her class, the Commissioner might appropriately examine whether certain events of classroom disruption did, in fact, occur. And under the second part of the above standard, there could be at least some minimal inquiry into whether it was reasonable for the board to conclude that, as a result, the person's increment should be withheld.

However, the court in *Kopera* made clear that this inquiry should be carried out with deference and restraint noting that:

> *The scope of the Commissioner's review is, as respondents say, not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions. Id. at 296.*

2. Decisions Upholding Actions by Local Boards

What then has been held to constitute a reasonable basis for a decision to withhold the increment of a teaching staff member? A general review of the cases reveals that the Commissioner has generally upheld the board's decision on its merits whenever that decision is based upon serious performance problems which were delineated in detailed evaluations which then culminated in a recommendation of the administrator that the person's increment be withheld. See e.g., *Kriss v. South Amboy Bd. of Ed.*, 1978 *S.L.D.* 844 (Leaving class unsupervised, refusing to meet with parents and supply information to guidance counselors, leaving building without notifying office, refusing to issue interim reports to failing students); *Dullea v. Northvale Borough Bd. of Ed.*, 1978 *S.L.D.* 558 and 638 (Written evaluations of unsatisfactory teaching skills and classroom supervision and failure to correct same); *Quay v. Haddon Twp. Bd. of Ed.*, 1976 *S.L.D.* 118 (Continued failure to submit lesson plans despite prior warnings); *Hostetter v. Union County Bd. of Ed.*, 1980 *S.L.D.* (August 7), dismissed St. Bd. for failure to perfect appeal 1980 *S.L.D.* (August 7) (Distributing review sheets which were almost identical to standardized tests); *Brown v. Sayreville Borough Bd. of Ed.*, 1981 *S.L.D.* (January 14) (Placing hands on students on two occasions, even when such contact fell short of corporal punishment); *Union Twp. Teachers' Assn. v. Union Twp. Bd. of Ed.*, 1981 *S.L.D.* (January 23) (Taking sick day to work in own business).

A recent decision by the Appellate Division underscores the limited nature of the Commissioner's review function and establishes the principle, potentially important for school boards, that a record of excessive absenteeism can constitute good cause for withholding a teacher's increment.

The Appellate Division decision in *Trautwein v. Bd. of Ed. of Bound Brook,* 1978 *S.L.D.* 445 (April 28), aff'd with modification St. Bd. 1979 *S.L.D.* (March 7), reversed, Superior Court of New Jersey, Appellate Division, (unpublished opinion), Docket No. A-2773-78, (decided April 8, 1980), certif. den. N.J. (decided June 12, 1980), reversed the Commissioner and State Board and upheld a board's decision to withhold a teacher's increment on the basis of a ten year attendance record. The teacher's annual average of absences during this period was 4 times (20.5 days) that of the average teacher. The school board had determined that this overall record diminished the staff member's effectiveness, deprived students of the quality of teaching to which they were entitled, and caused her to fall short of the performance standards which merited an increment. This decision was reached despite the fact that the teacher's actual classroom performance was excellent and her attendance record for the current year was satisfactory.

The Commissioner agreed that the excessive absenteeism could constitute good cause for withholding increments, 1979 *S.L.D.* (March 7, slip opinion at 9), but reversed the school board's decision on the grounds that it had erred in considering absences which occurred during several prior years. The state board modified the Commissioner's decision on this point, expressing its view that, although the earlier record may be less relevant, a teacher's entire record may properly be considered by the board. The state board concluded that although excessive absences can constitute "other good cause," the board action in this case should be reversed where each of the absences was legitmate and excused by a physician's certificate and where there was no showing that the teacher's performance or personal effectiveness was lessened by the absences.

The Appellate Division, invoking the *Kopera* standard, sharply disagreed with the state board's affirmance of the Commissioner's decision. It noted that the state board itself had removed one of the underpinnings of the Commissioner's decision when it held that the multi-year attendance could be considered by the local board. It stated that another prong of the Commissioner's decision—that there was no *prima facie* showing of diminished effectiveness—improperly placed the burden of proof on the local board rather than the teacher.

Finally, the court concluded that the state board's "ultimate ruling"—that the absences in light of their legitimacy, "were not so numerous as to justify the withholding of her increment" represented nothing more than a difference of opinion between the local and state boards (unpublished opinion at 10). It found this an insufficient basis for affirming the Commissioner's reversal, noting that there had been no finding that the local board's action was arbitrary or unreasonable or in any way constituted an abuse of its legislatively vested discretion.

Two cases have cited *Trautwein, supra,* as precedent and reiterated the principle that the issue of whether or not absences are material and/or have an adverse effect on children is a matter of judgment which must be left to the board. *Angelucci et al. v. Bd. of Ed. of the Town of West Orange,* 1980 *S.L.D.* (September 15), aff'd St. Bd., 1981 *S.L.D.* (February 4); *Virgil v. Board of Education of the Town of West Orange,* 1981 *S.L.D.* (January 2), aff'd St. Bd. 1981 *S.L.D.* (May 6).

3. Decisions Restoring Employee Increments

In only eight cases has the Commissioner reversed on its merits the decision of a board to withhold the increment of a teaching staff member. Although these cases are in the minority, it is useful to examine them in some detail to discern the

limits set on board discretion in this area.

In *Aikens v. East Paterson Borough Bd. of Ed.*, 1973 *S.L.D.* 80, the board's decision to withhold an increment was reversed based in part on the board's failure to follow the recommendation of the superintendent that the employee be granted an increment. It is clear from this case, however, that a board's increment decision is not defective *per se* because it contravenes the administrative recommendation. The board's decision was overturned in *Aikens* because, given the teacher's evaluations and a positive recommendation of the superintendent, there was no showing of some other legitimate basis for the board's dissatisfaction and decision to withhold the increment.

Several other decisions shed light on the question of what will be held to be inadequate grounds for withholding an increment on review by the Commissioner.

In *Fanella v. Washington Township Bd. of Ed.*, 1977 *S.L.D.* 383, the Commissioner reversed the board's decision to withhold the increment of a music teacher due to the teacher's failure to attract a sufficient number of students to the elective music program. The Commissioner stated that the popularity of a given elective program may depend on a variety of factors in addition to the reputation of its teacher. Noting further that all of the teacher's evaluations were generally positive, with some laudatory remarks and some suggestions for improvement, the Commissioner concluded that the board did not have an adequate basis for withholding the increment.

In *Brody v. Elmwood Park Bd. of Ed.*, 1980 *S.L.D.* (January 12) the Commissioner found that the board had acted arbitrarily in withholding the increment of a teacher who had laid his hands on two fighting students while trying to separate them, and who had placed his hands on another student while trying to wrest a dangerous object from him. The Commissioner determined that the board had no reasonable basis for its actions, finding that the teacher had behaved in a reasonably prudent manner and stating that the principal and superintendent had acted precipitously in response to a parental complaint.

In *DeOld v. Verona Borough Bd. of Ed.*, 1978 *S.L.D.* 1006, rev'g 1977 *S.L.D.* 1096 and *Baumlin v. Woodbridge Bd. of Ed.*, 1980 *S.L.D.* (March 17), aff'd St. Bd. 1980 *S.L.D.* (July 2), school board decisions to withhold an increment were reversed despite the fact that the teachers concerned admittedly violated school rules. In each of these cases the focus of the decision shifted from whether a particular infraction justified withholding an increment to whether the action, in view of the teacher's otherwise excellent record, warranted such measures by the board.

In *DeOld, supra,* a teacher, as advisor to the Coin Club, had acted as an agent by finding a buyer for coins of a student and had accepted money for his expenses. When the coins were learned to be the property of the student's mother, the coins were returned, but the board determined that the poor judgment shown by the petitioner was sufficient to warrant the withholding of his increment. The Commissioner agreed but was reversed by the state board which found that, in light of the teacher's excellent record, such activity did not constitute "other good cause" within the meaning of *N.J.S.A.* 18A:29-14, expressing its view that the penalty imposed by the local board was harsh and excessive.

Similarly, in *Baumlin, supra,* a teacher afflicted with a series of severe personal problems within a period of several months (hospitalization, sudden death of sister, responsibility for care of handicapped child) took a planned Easter vacation despite the fact that the Easter recess had been cancelled because of numerous snow days. Her principal had refused her request to use personal and sick days for this vacation, which she argued was urgently needed in light of the above problems. Her increment was withheld when she took the vacation anyway and, as

in *DeOld, supra,* the Commissioner noted that the penalty was "overly harsh." He further stated that there was no evidence in the record that the teacher's "highly commendable long-term record" was considered by the board in reaching its decision. Both the Commissioner, and the state board in its affirmance of the Commissioner's decision, emphasized the extraordinary circumstances of the case. The state board noted that under normal circumstances, the employee action involved here might have warranted withholding an increment. (Slip opinion at 2).

The approach in this case is thus more equitable, less statutorily based than in *DeOld,* and the overall record was viewed as mitigating the infraction rather than eliminating the statutory basis for board action. Nevertheless, both cases can be read to indicate that consideration of a teacher's overall record may be required when a single infraction is not an egregious one.

While the scope of the Commissioner's review of local boards' judgment is limited, *Basile v. Elmwood Park Borough Bd. of Ed.,* 1980 *S.L.D.* (July 21) makes it clear that a board must in fact exercise that judgment in deciding to withhold an increment. In this case, board action in withholding the increments of several staff members was based on the superintendent's policy of recommending the withholding of an increment whenever there were five or more "needs improvement" checks on a teacher's evaluation form. The superintendent applied this standard whether or not the principal who completed the form had in fact recommended such an action. This procedure was found to be arbitrary because the "unbending standard" made no provision for offsetting strengths and weaknesses or consideration of other comments made in the evaluation.

In only one case has the Commissioner found that a board's action in withholding an increment was triggered by improper motives. *In the Matter of the Tenure Hearing of Matcho,* 1980 *S.L.D.* (July 29), a board filed tenure charges and withheld the increments of several teachers on the basis of the same underlying facts: Failure to submit a written record of the placement status of students enrolled in a work program when requested to do so by administrators. (A request to consolidate the tenure and increment cases was denied). The teachers argued that the list was unnecessary and was being demanded in retaliation for, and use in, arbitration proceedings initiated by the teachers. The hearing examiner found that this insubordination warranted withholding an increment for one year. The Commissioner disagreed, noting that this "technical non-compliance," when viewed in the context of the tension surrounding the arbitration proceedings, did not warrant more than a reprimand, particularly since two other teachers who had also refused to submit the list had neither their increment withheld nor tenure charges filed against them. The Commissioner thus concluded that ". . . the board's response to respondent's insurbordinate behavior was partly retaliatory in nature." (Slip opinion at 10).

Finally, it should be noted that a board may also withhold the increment of a principal pursuant to *N.J.S.A.* 18A:29-14, and the standard of review will be the same. See, *Green v. Lakewood Board of Education,* 1980 *S.L.D.* (October 3), aff'd St. Bd. 1981 *S.L.D.* (March 4). Since cases involving the wtihholding of principals' increments are less frequent than those involving teachers, it is less clear what kind of activity constitutes "good cause" for withholding a principal's increment. Note that in *Green, supra,* however, general statements of administrative deficiencies—"low staff morale," "failure to carry out specific mandates of the board of education concerning absenteeism, tardiness, and vandalism"—were found to be too vague to permit the principal to defend himself. The increment withholding in that case was upheld on the basis of a charge of "inadequate teacher evaluation." This criticism has been detailed in the superintendent's evaluation of the principal.

PROCEDURE

The procedural requirements which must be met in withholding increments are twofold. First, certain procedures must be followed at the administrative level pursuant to *Fitzpatrick v. Montvale Borough Bd. of Ed.*, 1969 *S.L.D.* 4 wherein the Commissioner held:

> *Even though a board of education has the power to withhold a salary increment, such authority cannot be wielded in a manner which ignores all the basic elements of fair play. Conceding further that a salary increment may be denied for reasons other than unsatisfactory teaching performance, the most elemental requirements of due process demand at least that the employee to be so deprived be put on notice that such a recommendation is to be made to his employer on the basis of the unsatisfactory evaluation and that he be given a reasonable opportunity to speak in his own behalf. This is not to say that deprivation of a salary increase requires service of written charges, entitlement to a full scale plenary hearing or the kind of formal procedures necessary to dismissal of tenured employees. But certainly any employee has a basic right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment. Without such knowledge the employee has no opportunity either to rectify his deficiencies or to convince the superior that his judgment is erroneous. Id., at 7.*

It is clear from *Fitzpatrick* and also from subsequent decisions of the Commissioner that this initial requirement of notice and an opportunity to be heard is satisfied by prior notice of the administrator's recommendation and an informal opportunity to express views to that administrator. See e.g., *Brown v. Cinnaminson Township Bd. of Ed.*, 1974 *S.L.D.* 124. In fact, the notice does not have to specify that the administrator is recommending that the employee's increment be withheld; the notice requirement can be satisified by the ordinary process of evaluation whereby an employee is informed of deficiencies and has an opportunity to register his disagreement with the evaluation. *Dullea v. Northvale Borough Bd. of Ed., supra; Hillman v. Caldwell-West Caldwell Borough Bd. of Ed.*, 1977 *S.L.D.* 218; *Applegate v. Freehold Regional High School District Bd. of Ed.*, 1980 *S.L.D.* (July 15), aff'd St. Bd. 1981 *S.L.D.* (February 4); *Boynton v. Woodstown-Pilesgrove Regional School District*, 1980 *S.L.D.* (December 4). See also, *Angelucci* and *Virgil, supra*, where the Commissioner held that where attendance was one of the criteria used in evaluating teachers, they need not be informed that an increment may be withheld because of absenteeism.

There are also procedures which must be followed at the board level in withholding an increment. An increment can be withheld only by a recorded roll call majority vote of the full membership of the board; otherwise the board's action will be declared procedurally defective and void. *N.J.S.A.* 18A:29-14; *South Plainfield Indep. Voters v. South Plainfield Borough Bd. of Ed.*, 1975 *S.L.D.* 47. However, where a board errs by making its initial decision to withhold an increment at an executive session, it may correct the error by a public vote prior to the beginning of the next school year. *Winson v. Ridgewood Bd. of Ed.*, 1981 *S.L.D.* (January 19).

There is no requirement that an employee be given any kind of a hearing before the board at any time before or after the withholding of an increment. *Hillman, supra; Quay v. Hadden Township Bd. of Ed., supra; Boynton, supra; Simon v. Union County Bd. of Ed.*, 1980 *S.L.D.* (May 16).

Employees have attempted to argue that the language and holding in *Fitzpatrick, supra*, entitles them to a prior hearing before the board. However, in *Simon, supra*, it was held that the statute itself adequately and completely satisfies due process requirements by affording an employee the right to receive notice of the reasons for

withholding an increment *after* the board acts, and by giving the employee a right to appeal a board decision to the Commissioner. (Slip opinion at 9).

If, however, the board chooses to discuss an increment decision in a private session, it should provide the employees concerned with prior notice in order that they may exercise their right under the Sunshine Law to have this discussion carried out in a public session. *Rice v. Union County Regional High School Bd. of Ed.*, 155 *N.J. Super.* 64 (App. Div. 1977), certif. den. 76 *N.J.* 238 (1978); *N.J.S.A.* 10:4-12(8). There is no right on the part of the employee to speak or participate at such meetings, however. He or she merely has a right to force the board to discuss the matter at a public meeting.

After the board acts to withhold an increment it must within 10 days give the employee written notice that the increment was withheld and the reasons therefor. *N.J.S.A.* 18A:29-14. Many decisions of the Commissioner have held that failure to meet one or both of these requirements was a fatal defect and resulted in restoration of the increment to the teaching staff member. *Holly v. Passaic Bd. of Ed.*, 1978 *S.L.D.* 442; *Gill v. Clifton Bd. of Ed.*, 1976 *S.L.D.* 661; *Aikens, supra.*

However, in several cases failure to provide the required notice or reasons has not resulted in reversal where the Commissioner has determined that there has been substantial compliance with the intent of the statute. In *Marshall v. Southern Ocean County Regional High School District*, 1978 *S.L.D.* 593, the Commissioner noted that the intent of the notification requirement in the statute is to give the affected employee an opportunity to appeal the action to the Commissioner (slip opinion at 7) and held that, where the employee was given prior notice of the administrative recommendation and where he was afforded an opportunity to address the board and where he attended the public meeting where final action was taken, the intent of the notification requirement was met. Thus, where it can be shown that the employee had actual notice of the action and reasons, failure to give the additional notice required by statute may not result in reversal. See also, *Baker v. Bergenfield Borough Bd. of Ed.*, 1978 *S.L.D.* 740; *Huth v. Bd. of Ed. of Borough of Morris Plains*, 1980 *S.L.D.* (July 28). See also, *Zucaro v. Bd. of Ed. of the Red Bank Regional High School District*, 1980 *S.L.D.* (June 11), aff'd St. Bd. 1980 *S.L.D.* (November 5), where a board notice stating that an increment was withheld for reasons contained in a series of documents in the employee's personnel file was found deficient. The decision noted that the employee had not seen all of these documents, and thus did not have knowledge of all the factors on which the board based its decision.

However, in each of these cases, the Commissioner has issued a caveat to boards to follow the precise procedures set out in *N.J.S.A.* 18A:29-14. Also, where a board fails to provide the required notices and reasons within the 10 day period, it may correct the error by acting anew prior to the beginning of the subsequent school year in conformance with the statutory requirements. *Kriss v. South Amboy Bd. of Ed., supra; Fitzpatrick, supra.*

THE AMOUNT WITHHELD-WHAT ABOUT FUTURE YEARS?

The local board has a number of options in determining the exact increment amount to be withheld. The statute provides that the board may withhold the "employment increment, or adjustment increment, or both" of a teaching staff member. The Commissioner has steadfastly refused to give these terms the limited meanings set out in *N.J.S.A.* 18A:29-6 for the purposes of increment withholding.

Thus, the Commissioner has held that a board may simply freeze the person's

salary by withholding both the employment step increment (the increment corresponding to a step on the guide based on years of service) and the guide adjustment increment (the change in the guide itself due to a negotiated increase). *Ackerman v. Kinnelon Borough Bd. of Ed.*, 1978 *S.L.D.* 717; *Gill, supra; Longo v. Absecon Bd. of Ed.*, 1975 *S.L.D.* 336.

The Commissioner has also upheld the authority of a board to withhold only the employment step increment. *Seybt v. Hawthorne Borough Bd. of Ed.*, 1975 *S.L.D.* 593. The only caveat is that the board must withhold the entire employment step increment and cannot withhold only a portion thereof. *Coniglio v. Teaneck Township Bd. of Ed.*, 1973 *S.L.D.* 449. However, where a board, pursuant to its policy, conducts a mid-year review of its disciplinary action and determines that the employee has made sufficient improvement, the board may restore one-half of an increment six months after a full yearly increment is withheld. *Union Twp. Teachers Assn. v. Union Township Bd. of Ed., 1981 S.L.D.* (January 23). The Commissioner has also upheld the authority of a board to withhold what is commonly termed a "longevity increment" which is a payment beyond the top step of the salary guide based on further years of employment. *Marshall, supra; Hillman, supra; Seybt, supra.*

Although the above options are relatively clear and simple to put into effect, there is often confusion as to what salary the employees should receive in subsequent years. The question frequently asked is whether the employees must be restored to their proper steps on the guide in future years or whether they can be kept behind permanently. The Commissioner directly confronted this question in *Garibaldi v. Toms River Regional School District Bd. of Ed.*, 1977 *S.L.D.* 192 and held that the board may withhold the increment permanently so that the employee would remain a step behind for the balance of his employment with the district. The Commissioner reached this decision based upon the explicit language of *N.J.S.A.* 18A:29-14 that:

> *It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.*

Thus, the board has at least four distinct alternatives in withholding the increment of a teaching staff member. Based upon the following sample salary guide:

SAMPLE SALARY GUIDE

	1979-80	1980-81	1981-82
Step 4	$13,000	$13,600	$14,200
Step 5	13,500	14,100	14,700
Step 6	14,000	14,000	15,200

if no increments were withheld, the teaching staff member would receive the salaries underlined on the guide for the three years in question.

In withholding the increment of teaching staff members for 1980-81, the board would have the following alternatives and would pay the salaries listed after each alternative:

A—Withhold employment increment only, for 1980-81 school year only

1979-80	1980-81	1981-82
$13,000	$13,600	$15,200

B—Withhold employment increment only but on a permanent basis

1979-80	1980-81	1981-82
$13,000	$13,600	$14,700

C—Withhold entire increment for 1980-81 school year only

1979-80	1980-81	1981-82
$13,000	$13,000	$15,200

D—Withhold entire increment permanently

1979-80	1980-81	1981-82
$13,000	$13,000	$14,700

Note that even where the entire increment is withheld, such that the 1980-81 salary is the same as that for 1979-80, in the following year the employee must be returned to some step on the then current (1981-82) guide. *Gregg v. Camden County Vocational and Technical School District*, 1977 *S.L.D.* 120.

In *Cohen v. Bd. of Ed. of the Ocean County Vocational Technical School*, 1980 *S.L.D.* (June 19), the Commissioner did approve the placement of an employee at a salary level which was not on the existing guide. Here, the board each year deducted from the employee's salary the increment amount which was originally withheld. As a result, the employee was kept one step behind on the salary guide and received a salary which did not correspond to any step on the current schedule. While the decision seems to authorize a permanent denial of an increment more severe than simply keeping an employee one step behind on a salary schedule, the case may have limited significance in that the Commissioner was interpreting a stipulated agreement for the dismissal of tenure charges which provided for the withholding of the employee's increment. The agreement specifically stated that the employee would be barred from recapturing the increment in any form.

The board has discretion to withhold an increment under any of the four alternatives listed above. The choice of which alternative—A, B, C or D—should be made by the board on the basis of all the facts before it, including the extent of the inefficiency or other good cause and any other relevant circumstances which the board may wish to consider. In order to avoid the possibility of confusion and lessen the potential for litigation, it is strongly advised that the required notice to the employee specify which type of increment is being withheld (i.e. the employment step increment or both the step increment and the adjustment guide increment) and whether the withholding is for the one year only or is permanent (i.e. that the teacher will remain one year behind in future years.) This last point is particularly important in light of *Vandercher v. Piscataway Bd. of Ed.*, 1980 *S.L.D.* (March 21) and *McKenna v. Piscataway Bd. of Ed.*, 1980 *S.L.D.* (March 28). In each of these cases, the Commissioner upheld board actions in withholding increments because of frequent lateness. However, in each case he agreed with employee arguments that, given the statutory provision that an increment need not be restored in future years, the withholding of an increment might constitute excessively severe punishment for their actions. Accordingly, he directed the boards to withhold the increments for a 2 year probationary period, at the end of which the employees' attendance records must be re-evaluated.

These decisions should not necessarily be read as requiring boards to adopt the standard practice of annually re-evaluating every decision to withhold an increment on a permanent basis. In both cases, the employees filed petitions with the Commissioner very soon after they were notified that their increments had been withheld, and the Commissioner simply weighed the relatively minor nature of the infractions against the severity of a permanent increment denial and concluded that the penalty was excessive.